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NOTE: CHANGES MADE BY THE COURT

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ASTRAZENECA LP and
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ERIC ADAMS, et al.,

Plaintiffs,

vs.

I-FLOW CORPORATION, et al.,

Defendants.

Case No. CV09-09550 R (SSx)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS PURSUANT
TO F.R.C.P. 12(b)(6); AND
MOTIONS TO STRIKE PURSUANT TO
F.R.C.P. 12(f)**

This matter comes before the Court on the motions to dismiss and/or strike of Defendants AstraZeneca Pharmaceuticals LP, AstraZeneca LP, Breg Inc., DJO Incorporated, DJO, LLC, I-Flow Corporation, Moog Inc., McKinley Medical, LLC, Curlin Medical Inc., Sorenson Medical Products Inc., Stryker Corporation, and Stryker Sales Corporation (collectively "Defendants"). For the reasons set forth below, the motions to dismiss and strike are GRANTED.

Defendants Abbott Laboratories, Hospira, Inc., APP Pharmaceuticals, LLC, APP Pharmaceuticals, Inc., Abraxis BioScience, LLC, Abraxis BioScience, Inc.,

1 and Pacific Medical, Inc. also filed motions to dismiss and/or strike based on the
2 same grounds as the instant motions. Those motions were scheduled to be heard on
3 April 5, 2010, and May 3, 2010. Because these motions present the same issues as
4 the instant motions and because the Court has ordered plaintiffs' claims severed
5 with each plaintiff to file his or her own individual complaint, the Court orders the
6 motions scheduled for April 5, 2010, and May 3, 2010, OFF CALENDAR AS
7 MOOT; and therefore, this case, CV-09-9550-R, is now closed without prejudice to
8 individual plaintiffs filing separate actions against specific defendants under new
9 case numbers, as further indicated in this order.

10 **I.**

11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 This case involves a so-called "mass action" product liability lawsuit
13 removed from the Superior Court of the State of California for the County of Los
14 Angeles pursuant to 28 U.S.C. sections 1332(d) and 1453. As alleged in the
15 Complaint, one-hundred, forty-one (141) plaintiffs underwent separate shoulder
16 surgeries at different times, in different hospitals, in thirty-seven (37) states and
17 Canada, that were performed by different doctors, to treat different injuries to
18 plaintiffs' respective shoulders, over the span of a ten (10) year period. Following
19 each plaintiff's respective surgery, an unidentified pain pump was used to
20 administer an unidentified pain relief medication into the plaintiff's shoulder joint.
21 Plaintiffs claim injury as a result of the unidentified pain pumps' administration of
22 the unidentified anesthetics.

23 Plaintiffs sue twenty-two (22) defendants who they allege manufactured and
24 distributed either pain pumps or anesthetics, presumably of the type used following
25 plaintiffs' surgeries. Nowhere in their Complaint does even one of the plaintiffs
26 identify the particular pain pump or anesthetic used following his or her specific
27 surgery or the manufacturers of those products. Instead, the Complaint uses
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1 generalized terms to identify these products, such as “pain pump” and “local
2 anesthetic.” *See, e.g.*, Complaint, ¶ 1.

3 Plaintiffs allege the following causes of action against all defendants
4 generally: negligence (and negligence per se), strict products liability, breach of
5 express warranty, breach of implied warranty, negligent misrepresentation, and
6 fraudulent concealment. Plaintiffs assert an additional cause of action for violation
7 of state consumer fraud and deceptive trade practices acts against a group of the
8 defendants, which plaintiffs call the “Defendant Pain Pump Manufacturers”¹

9 In their Oppositions to the several defendants’ motions, plaintiffs admit that,
10 at the time they filed the Complaint, they did not know the identity of the
11 manufacturer of the pain pump or the anesthetic that was used in any of their
12 respective surgeries. *See, e.g.*, Plaintiffs’ Opposition to Defendants AstraZeneca
13 LP and AstraZeneca Pharmaceuticals LP’s Motion to Dismiss; and Motion to Strike
14 Pursuant to F.R.C.P. 12(b)(6) [Document 39] at 3:5-7, 7:9-13. However, in
15 Oppositions to defendants’ motions and at oral argument, plaintiffs’ counsel
16 represented that they have obtained information that will permit some, but not all,
17 plaintiffs to identify the manufacturer of the pain pump that was used in the
18 surgeries of the individual plaintiffs. *See, e.g., id.* at 7:7-9. The plaintiffs who do
19 not know the identity of the pain pump or anesthetic used following their surgery
20 request discovery to ascertain this information. *See, e.g., id.* at 7:9-13.

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26 ¹ Plaintiffs define “Defendant Pain Pump Manufacturers” to include Defendants I-
27 Flow Corporation, Stryker Corporation, Stryker Sales Corporation, McKinley
28 Medical, LLC, Moog Inc., Curlin Medical Inc., DJO Incorporated, DJO, LLC,
Reable Therapeutics, Inc., Pacific Medical, Inc., Breg Inc., Orthofix, Inc., Sgarlato
Laboratories, Inc., Sorenson Medical Products Inc.

II.

MOTION TO DISMISS

A. Plaintiffs' Entire Complaint Fails to State a Claim

1. Legal Standard

A defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rule 8 requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The complaint need not contain detailed factual allegations, but it must provide more than "a formulaic recitation of the elements of a cause of action." *Id.* at 555.

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference *the defendant* is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that *a defendant* has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" *a defendant's* liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (emphasis added).

In resolving a 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the complaint. *Pareto v. F.D.I.C.*, 139 F.3d

1 696, 699 (9th Cir. 1998). Assertions that are mere “legal conclusions,” however,
2 are not entitled to the assumption of truth. *Iqbal*, 129 S.Ct. at 1950, citing
3 *Twombly*, 550 U.S. at 555.

4 When granting a motion to dismiss, a court has discretion to allow leave to
5 amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). When it is
6 clear the complaint cannot be saved by amendment, dismissal without leave to
7 amend is appropriate. *See Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d
8 1048, 1052 (9th Cir. 2003).

9 **2. Discussion**

10 The Complaint fails to state a claim against Defendants under Rule 8,
11 *Twombly*, and *Iqbal*. To state a claim against any of the defendants, each plaintiff
12 must allege that each defendant caused his or her alleged injuries. Specifically, in
13 an action such as this, a plaintiff must allege the identity of the particular defendant
14 who manufactured the pain pump and the particular defendant who manufactured
15 the anesthetic that allegedly injured plaintiff. *See Timmons, et al. v. Linvatec*
16 *Corporation, et al.*, 2010 WL 476661 *2 (C.D. Cal. 2010).

17 The Complaint does not allege that any particular plaintiff was administered
18 a particular drug through a particular pain pump that was manufactured by a
19 particular defendant. Instead, plaintiffs plead only generally that they were injured
20 by pain pumps and anesthetics of the type made by defendants. By suing fourteen
21 (14) “Defendant Pain Pump Manufacturers” and eight (8) “Defendant Anesthetic
22 Manufacturers,” the Complaint at most alleges that the individual defendants
23 theoretically could have been the one who manufactured the pain pump or
24 anesthetic used following each plaintiff’s surgery. But, the Complaint never
25 specifies that any one of the defendants, as opposed to the 21 other defendants,
26 caused each plaintiff’s claimed injury. As such, plaintiffs plead nothing more than
27 the sheer possibility that any particular defendant might have manufactured the
28 product that allegedly injured each plaintiff. This sort of speculative pleading is not

1 permitted under the plain text of Rule 8, which requires a “statement of the claim
2 showing that the pleader is entitled to relief.” *See Ashcroft v. Iqbal*, 129 S.Ct. 1937;
3 *see also Timmons, et al. v. Linvatec Corporation, et al.*, 2010 WL 476661 *2 (C.D.
4 Cal. 2010). Accordingly, plaintiffs’ Complaint must be dismissed for failure to
5 state a claim.

6 However, as plaintiffs’ counsel has represented to the Court that some of the
7 plaintiffs have the requisite evidentiary support under Rule 11 to plead the identity
8 of some of the manufacturers of the pain pumps used following their surgeries, the
9 Court cannot conclude that leave to amend would be futile as to all of the one-
10 hundred, forty-one (141) plaintiffs. *Compare, Timmons, et al. v. Linvatec*
11 *Corporation, et al.*, 2010 WL 476661 at *4. Accordingly, and as explained in more
12 detail below, plaintiffs are granted leave to amend to identify (1) the particular pain
13 pump used, (2) the particular anesthetic they received, and (3) the manufacturer of
14 those products.

15 **B. Statute of Limitations**

16 In a federal diversity action based on alleged violations of state law, the state
17 statute of limitations controls. *Bancorp Leasing and Financial Corp. v. Agusta*
18 *Aviation Corp.*, 813 F.2d 272, 274 (9th Cir. 1987). The present action was removed
19 to this Court pursuant to 28 U.S.C. 1332(d), a subsection of the diversity
20 jurisdiction statute.

21 California has a two-year statute of limitations with respect to plaintiffs’
22 claims based on negligence and strict product liability theories. Cal. Code Civ.
23 Proc., §§ 335 and 335.1. California law includes a discovery rule that delays the
24 accrual of a cause of action until a plaintiff either became aware of the injury and
25 its cause or could have discovered the injury and cause through reasonable
26 diligence. *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103. Plaintiff, however, must
27 specifically plead facts to show the time and manner of discovery and the inability
28 to have made an earlier discovery despite reasonable diligence. *Fox v. Ethicon*

1 *Endo-Surgery, Inc.*, 35 Cal.4th 797, 808 (2005).

2 Plaintiffs filed this lawsuit on October 28, 2009. Therefore, several of
3 plaintiffs' claims are facially time-barred based on the dates of their surgeries and
4 corresponding injuries. For example, any claim based on negligence or strict
5 product liability theories for an injury that occurred prior to October 28, 2007, is
6 facially barred by the two-year statute of limitations of California Code of Civil
7 Procedure section 335.1.

8 Plaintiffs' Complaint generically alleges on behalf of all one-hundred, forty-
9 one (141) plaintiffs that they were unaware of a causal link between their alleged
10 injuries and defendants' products until less than one year prior to filing the
11 Complaint. *See* Complaint, ¶ 144. This conclusory allegation fails to state when
12 and how each plaintiff discovered his or her alleged injuries were caused by
13 defendants' products. It also fails to provide any facts that support their assertion as
14 to why each plaintiff could not have discovered this information earlier.
15 Accordingly, plaintiffs have not pled facts that are sufficient to invoke the
16 discovery rule to delay the accrual of their individual causes of action, as required
17 under California law. Thus, several of the plaintiffs' claims, including the
18 negligence and strict product liability claims of the plaintiffs who underwent
19 surgery prior to October 28, 2007, are facially time-barred and are dismissed.
20 Plaintiffs are given leave to amend to state, if they can, the information required
21 under *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797 to delay the accrual of
22 their causes of action.

23 **C. Plaintiffs' Breach of Warranty Claims**

24 Plaintiffs' Third and Fourth Causes of Action for breach of warranty cannot
25 be maintained under California law and are dismissed with prejudice. Under
26 controlling California law, privity between the patient and the manufacturer of
27 medical device or pharmaceutical product is a necessary component of breach of
28 warranty claims. *See Blanco v. Baxter Healthcare Corp.*, 158 Cal.App.4th 1039,

1 1058-59 (2008). In the context of prescription medical devices and
2 pharmaceuticals, the transaction is between the manufacturer and the physician, not
3 the patient. *Id.* Plaintiffs' Complaint is devoid of any facts suggesting that
4 plaintiffs relied upon anything other than their physicians' skill and judgment in
5 selecting and prescribing the anesthetics and pain pumps. Indeed, because the
6 Complaint alleges that the local anesthetics and pain pumps were administered
7 post-surgery in a hospital environment, no plausible inference can be drawn that
8 any purchase of a product at issue was based on a warranty from the manufacturer
9 to the plaintiff. There was simply no relationship between the defendant
10 manufacturers and the plaintiffs. Under these circumstances, plaintiffs cannot
11 maintain claims based on breach of express or implied warranty and these claims
12 are dismissed with prejudice.

13 **D. Plaintiffs' Fraud and Misrepresentation Claims**

14 A cause of action for negligent misrepresentation or fraudulent
15 concealment must be pled with heightened specificity. Fed. R. Civ. P. 9(b); *Vess v.*
16 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003); *Meridian Project*
17 *Sys., Inc. v. Hardin Constr. Co.*, 404 F.Supp.2d 1214, 1219 (E.D. Cal. 2005). Thus,
18 a plaintiff must plead "the who, what, when, where and how" of the fraud or
19 misrepresentation. *Vess*, 317 F.3d at 1106. Moreover, when a plaintiff sues
20 multiple defendants, "Rule 9(b) does not allow a complaint to merely lump multiple
21 defendants together but require(s) plaintiffs to differentiate their allegations when
22 suing more than one defendant ... and inform each defendant separately of the
23 allegations surrounding his alleged participation in the fraud." *Swartz v. KPMB*
24 *LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). Thus, in order to state a valid fraud or
25 misrepresentation claim, plaintiffs must identify the alleged misrepresentations
26 made to them by each defendant with heightened specificity.

27 The Fifth and Sixth Causes of Action of the Complaint fail to satisfy the
28 heightened pleading requirements of Rule 9(b). The one hundred, forty-one (141)

1 plaintiffs impermissibly lump together their allegations against all defendants.
2 Further, the allegations fail to set forth any facts concerning the “who, what, when,
3 where, and how” with respect to the alleged fraud and misrepresentations.
4 Accordingly, the Fifth and Sixth Causes of Action for fraud and misrepresentation
5 are dismissed. Plaintiffs are permitted leave to amend these claims in conformity
6 with Rule 9(b) and this order.

7 **E. Fraud and Deceptive Trade Practices Act Claims**

8 Plaintiffs assert a Seventh Cause of Action for Violation of State Consumer
9 Fraud and Deceptive Trade Practices Act against the defendants they group together
10 as “Defendant Pain Pump Manufacturers.” Although not clearly stated, it appears
11 plaintiffs are attempting to allege a claim for violation of California Business and
12 Professions Code sections 17200, *et seq.*, typically referred to as the Unfair
13 Competition Law. Section 17200, *et seq.* prohibits unfair competition, which
14 includes any unlawful, unfair or fraudulent business act or practice and unfair,
15 deceptive, untrue or misleading advertising. To plead such a claim, however, a
16 plaintiff must allege with reasonable particularity facts to support the statutory
17 elements of the violation. *Khoury v. Maly’s of California, Inc.*, 14 Cal.App.4th 612
18 (1993). Plaintiffs, however, fail to offer any particularity with respect to the alleged
19 violations by each “Defendant Pain Pump Manufacturer.”

20 Plaintiffs offer no particularity with respect their Seventh Cause of Action.
21 They allege no facts as to which misrepresentations were made by which
22 defendants. They have not alleged that any of the “Defendant Pain Pump
23 Manufacturers” conducted any specific business activity or advertising, unfair or
24 not, which in any way caused any loss of money or property to any plaintiff. Thus,
25 plaintiffs’ Seventh Cause of Action fails to state a claim on behalf of any particular
26 plaintiff against any particular defendant. Accordingly, the Seventh Cause of
27 Action is dismissed. Plaintiffs are given leave to amend to adequately plead
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1 plausible claims of relief on behalf of each individual plaintiff against each
2 individual defendant.

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6 **III.**

7 **MOTION TO STRIKE**

8 Federal Rule of Civil Procedure 12(f) provides that a court “may order
9 stricken from any pleading . . . any redundant, immaterial, impertinent, or
10 scandalous matter.” “[T]he function of a 12(f) motion to strike is to avoid the
11 expenditure of time and money that must arise from litigating spurious issues by
12 dispensing with those issues prior to trial. . . .” *See Fantasy, Inc. v. Fogerty*, 984
13 F.2d 1524, 1527 (9th Cir. 1993) (reversed on other grounds *sub nom. Fogerty v.*
14 *Fantasy, Inc.*, 510 U.S. 517 (1994)). “‘Immaterial’ matter is that which has no
15 essential or important relationship to the claim for relief or the defenses being
16 pleaded” and “‘[i]mpertinent’ matter consists of statements that do not pertain, and
17 are not necessary, to the issues in question.” *Id.* (citing 5 Charles A. Wright &
18 Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706-07, 711 (1990)).

19 **A. Design Defect Allegations**

20 Controlling California law unequivocally bars strict liability claims for
21 design defect against pharmaceutical manufacturers. *See Brown v. Superior Court*,
22 44 Cal.3d 1049, 1061 (1988) (“[A] drug manufacturer’s liability for a defectively
23 designed drug shall not be measured by the standards of strict liability.”); *see also*
24 *Artiglio v. Superior Court of San Diego County*, 22 Cal.App.4th 1388, 1392-93
25 (1994). In *Brown*, the California Supreme Court held that both of the tests for
26 establishing design defect in California — i.e., the consumer expectations test and
27 the risk-benefit test — are inappropriate in the context of prescription
28 pharmaceutical products.

1 Plaintiffs' Complaint contains allegations asserting a design defect theory,
2 including allegations concerning the tests for design defect liability. Inasmuch as
3 these allegations are related only to design defect theories of products liability that
4 are unequivocally barred by California law, they are stricken without leave to
5 amend as immaterial and impertinent.

6 **B. Allegations of Failure to Warn Plaintiffs, the Public, and the FDA**

7 In personal injury cases involving prescription medications and devices, a
8 manufacturer's duty to warn runs only to the physician or other "learned
9 intermediary" — *not* to the patient or the general public. *See Carlin v. Superior*
10 *Court*, 13 Cal.4th 1104, 1116 (1996) ("in the case of prescription drugs, the duty to
11 warn runs *to the physician*, not to the patient"). "In the case of medical
12 prescriptions . . . 'there is no duty by the drug manufacturer to insure that the
13 warning reaches the doctor's patient for whom the drug is prescribed.'" *Stevens v.*
14 *Parke, Davis & Co.*, 9 Cal.3d 51, 65 (1973) (internal quotations and citation
15 omitted). The patient is presumed to have learned "through the physician ... of the
16 properties and proper use of the drug or implant." *Valentine v. Baxter Healthcare*
17 *Corp.*, 68 Cal.App. 4th 1467, 1483 (1999). (emphasis in original); *see also Sherman*
18 *v. Stryker Corp.*, 2009 WL 2241664, *4 (C.D. Cal. March 30, 2009).

19 Furthermore, state-law claims predicated on allegations that a manufacturer
20 made misrepresentations to the Food and Drug Administration ("FDA") are
21 prohibited by federal law. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S.
22 341, 350, 353 (2001) (barring state-law "fraud-on-the-FDA" claims because they
23 "inevitably conflict with the FDA's responsibility to police fraud consistently with
24 the Administration's judgment and objectives"); *see also Kimmel, Inc. v.*
25 *DowElanco*, 275 F.3d 1199, 1204-07 (9th Cir. 2002) (applying *Buckman* to
26 preclude a California state law claim for intentional interference with a prospective
27 economic advantage premised on the allegation that defendant knowingly submitted
28 false information to the EPA).

1 Plaintiffs' Complaint contains allegations that Defendants failed to warn
2 plaintiffs, the public, and the FDA. As these allegations are unequivocally barred
3 under California and federal law, leave to amend would be futile. The Court strikes
4 these improper allegations without leave to amend.

5 **C. Plaintiffs' Request for a Constructive Trust Over Defendants'**
6 **Profits**

7 Based on their Seventh Cause of Action for Violation of State Consumer
8 Fraud and Deceptive Trade Practices Act, Plaintiffs pray for the "[i]mposition of a
9 constructive trust over and restitution of the monies collected and profits realized
10 by the DEFENDANT PAIN PUMP MANUFACTURERS." However, "non-
11 restitutionary disgorgement of profits is not an available remedy in an individual
12 action under the [Unfair Competition Law]." *Korea Supply Co. v. Lockheed Martin*
13 *Corp.*, 29 Cal.4th 1134 (2003). Plaintiffs do not contend that, as a result of the
14 alleged unfair, deceptive, and illegal practices, they gave money or property to any
15 of the Defendant Pain Pump Manufacturers. Thus, plaintiffs impermissibly seek
16 non-restitutionary disgorgement of profits. Accordingly, plaintiffs' prayer for
17 "imposition of a constructive trust over and restitution of the monies collected and
18 profits realized by the DEFENDANT PAIN PUMP MANUFACTURERS" is
19 stricken without leave to amend.

20 **D. Plaintiffs' Request for Injunctive Relief**

21 Based on their Seventh Cause of Action for Violation of State Consumer
22 Fraud and Deceptive Trade Practices Act, Plaintiffs seek to enjoin Defendant Pain
23 Pump Manufacturers from engaging in unspecified acts of unfair competition.
24 Injunctive relief under the Unfair Competition Law, however, is available only to
25 plaintiffs who can establish that they have no adequate remedy at law for damages
26 available to them. *Philpott v. Superior Court*, 1 Cal.App.2d 512, 517 (1934); *Knox*
27 *v. Phoenix Leasing Inc.*, 29 Cal.App.4th 1357 (1994); *Prudential Home Mortgage*
28 *Company, Inc. v. Superior Court*, 66 Cal.App.4th 1236 (1998). Should plaintiffs

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ultimately prevail on their claims, they will be adequately compensated for their alleged injuries by an award of damages. Accordingly, plaintiffs' request for injunctive relief is improper and is stricken without leave to amend.

IV.

MISJOINDER OF CLAIMS

Rule 20 of the Federal Rules of Civil Procedure specifies when parties plaintiff may be joined in one action. In pertinent part, it provides:

Persons may be joined in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all parties will arise in the action.

Fed. R. Civ. P 20(a)(1). The California rule on joinder of parties plaintiff is practically identical to Rule 20. *See* Cal. Code Civ. Proc. § 378(a)(1) ("All persons may join in one action as plaintiffs if: [¶] (1) They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action").

Plaintiffs' claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences. As alleged in the Complaint, one-hundred, forty-one (141) plaintiffs underwent separate shoulder surgeries that were performed at different times over the span of a ten (10) year period. These surgeries were performed in different hospitals located in thirty-seven (37) states and Canada. There are numerous different surgeons, anesthesiologists, and other physicians involved with these surgeries who are unlikely to have any common link to any two (2) of these plaintiffs, let alone one-hundred, forty-one (141) of them. Further, the medical histories of the plaintiffs that necessitated the procedures are

1 certainly diverse and likely share no commonality. Moreover, the surgeries at issue
2 apparently involved different pain pumps and anesthetic drugs, as well as numerous
3 other surgical products, risk factors, and circumstances unique to each plaintiff.
4 When faced with the same misjoinder of plaintiffs in different regions, other district
5 courts have severed the claims of multiple plaintiffs, finding that the sole common
6 allegation of pain pump or anesthetic use did not constitute a same transaction,
7 occurrence, or series of transactions or occurrences. *See Warner v. Stryker Corp.*,
8 2009 WL 1773170 (D. Or. June 22, 2009); *Frobes v. Stryker Corp.*, 2009 WL
9 3387037 (E.D.N.Y. August 5, 2009).

10 Based on the above, the Court finds that the claims of these one-hundred,
11 forty-one (141) plaintiffs are misjoined in this single action. Accordingly, the
12 Court hereby severs plaintiffs' claims. The Court retains jurisdiction over these
13 claims pursuant to 28 U.S.C. § 1332(d) (*see Cooper v. R.J. Reynolds Tobacco Co.*,
14 586 F.Supp.2d 1312 (M.D. Fla. 2008)) and the claims for which the Court has
15 dismissed with leave to amend may only be maintained going forward, if at all, in
16 individual actions.

17 V.

18 FURTHER PROCEEDINGS

19 As stated above, each individual plaintiff is provided leave to amend to state,
20 in a separate action and under a new case number, his or her claims for negligence,
21 strict products liability, fraudulent concealment, negligent misrepresentation, and
22 violations of state fraud and deceptive practices acts in conformity with this order
23 — i.e., each complaint must specifically identify the actual product(s) alleged to
24 have injured the plaintiff and name only the defendant(s) responsible for
25 manufacturing such product(s). In addition, each plaintiff whose claims are facially
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1 barred by the statute of limitations must also adequately plead the applicability of
2 the delayed discovery rule concerning the accrual of their claims.

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4 IT IS SO ORDERED.

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6 Dated: March 30, 2010

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9 Hon. Manuel Real
10 United States District Court Judge
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